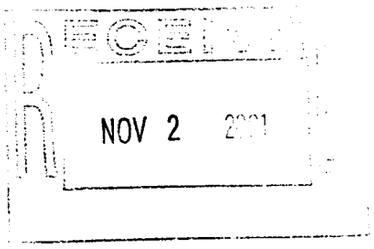
November 2,2001



Ann Terbush
Chief, Permits Division
National Marine Fisheries Service
Room 13102
1315 East-West Highway
Silver Spring, MD 20910

Re: Permit Regulations

Dear **Ms.** Terbush:

On behalf of the Earth Island Institute and its 70,000 members worldwide, enclosed are comments to the proposed Marine Mammal Protection Act permit regulations published on July 3,2001. If you have **any** questions regarding these comments, please contact me.

Sincerely,

Mark Berman
Assistant Director
Marine Mammal Project

cc: Barbara Kohn, D.V.M.
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COMMENTS ON

THE NATIONAL MARINE FISHERIES SERVICE PROPOSED REGULATIONS FOR PROTECTED SPECIES PERMITS

SUBMITTED

BY

EARTH ISLAND INSTITUTE

November 2,2001

INTRODUCTION

On July 3, 2001, the National Marine Fisheries Service ("NMFS") proposed to amend its permit regulations promulgated under the Marine Mammal Protection Act ("MMPA"). 66 Fed. Reg. 35209-220. The proposed regulations are intended to implement the 1994 amendments to the MMPA. NMFS provided a 60-day comment period. In response to a request from the public display industry, NMFS extended the comment period another 60 days.

These comments are submitted by the Earth Island Institute ("EII"). EII is an international environmental organization with a membership of nearly 70,000. EII has been actively involved in numerous marine mammal conservation initiatives. Among the issues of concern to EII is the care and maintenance of marine mammals in captivity. EII has participated in numerous MMPA permit issues in the past, including the pending application by two Japanese aquaria to export Alaskan sea otters for public display, the 1997 request by the Dallas World Aquarium to import Amazon River dolphins from Venezuela, and the 1993 permit to import pseudorcas from Japan for public display at Marine World. EII also has been involved in the Keiko reintroduction program, and has participated in various other regulatory and policy issues regarding MMPA permits and the captive maintenance of marine mammals.

EII's comments are set forth in three parts. First, EII's provides its general comments. Second, EII comments on statements in the preamble and on the language in the proposed regulations. These specific comments are set forth by Federal Register page reference or proposed section number. Finally, EII responds to testimony presented by the public display industry at the October 11, 2001, MMPA reauthorization hearing before the Subcommittee on Fisheries Conservation, Wildlife and Oceans of the House Resources Committee.

GENERAL COMMENTS

EII supports efforts by NMFS to ensure that adequate protection is provided to marine mammals in captivity, in both domestic and foreign facilities. The proposed regulations are, for the most part, a step in the **right** direction. However, they do not go far enough. Greater attention needs to be given to the welfare of marine mammals in captivity. EII believes that protecting marine mammals in captivity remains within the province of NMFS[1] under the MMPA, notwithstanding efforts of the public display industry to weaken that law through the 1994 MMPA amendments.

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[1] NMFS and the U.S. Fish and Wildlife Service ("FWS") share permit responsibility for **marine** mammals. Although these comments are directed at the NMFS proposal, the general issues presented by EII apply with equal force to FWS.

NMFS should continue to take the necessary regulatory actions to strengthen the protection for marine mammals held in public display facilities. Ample authority is provided under the MMPA for NMFS to take such action while still adhering to the principles set forth in the **1994** MMPA amendments, respecting the sovereignty of foreign nations, and avoiding unnecessary interference with the roles of other agencies. These comments set forth EII's views on how the proposed regulations can be improved to acheve these goals.

Coordination Among Agencies. Four federal agencies are responsible for the care and maintenance of marine mammals in captivity. NMFS shares MMPA management responsibility with FWS. These agencies are to consult with the Marine Mammal Commission ("MMC"), which has MMPA oversight responsibility. The Animal and Plant Health Inspection Service ("APHIS") is responsible for administering the Animal Welfare Act ("AWA").

The interests of all four federal agencies are touched upon by these regulations. It therefore follows that the regulations should be developed in coordination with all of the agencies. In particular, because FWS and NMFS share responsibilities under the MMPA for permit program implementation, EII believes that the efforts of these two agencies should be coordinated and that, whenever possible, joint regulations should be published.

Such coordination does not appear to have taken place. The proposed regulations do not reflect the joint effort of FWS/NMFS. Nor is it apparent that the proposal has been developed through advance consultation with MMC and APHIS. To the extent such coordination has not occurred, EII requests that an interagency effort be undertaken now. The regulations will be strengthened and administered more effectively if they reflect the combined effort of all four agencies. Certainly, such an approach is consistent with Interagency Agreement among NMFS, FWS and APHIS, effective August 1, 1998. EII also specifically requests that joint FWS/NMFS MMPA permit standards be established. These two agencies should not maintain separate regulations. Should additional proposed regulations be necessary to achieve this result, EII would support such action.

Ultimately, the MMPA permit program will be better constructed to acheve its goals if joint regulations exist. Such an approach will ensure efficient, consistent, cost-effective programs. A coordinated interagency program will avoid confusion among regulated entities and interested parties and bring strength to administration and enforcement. As the agency responsible for this proposal, it is incumbent upon NMFS to open these channels of communication and coordination with the other agencies. FWS, MMC, and APHIS should, in response, participate cooperatively and in a timely manner in the development of final regulations. Ultimately, all involved federal

agencies should be proceeding with their respective responsibilities under a shared set of principles and standards in furtherance of the common goal of providing the greatest level of protection to marine mammals held in captivity.

MMPA Applicability to Individual Marine Mammal Welfare. Over a period of many years, it has been a constant refrain of the public display industry that the MMPA is concerned only with population stocks and the capture and removal of animals from the wild. Based upon this argument, and in an effort to relax the standards under which public display facilities must operate, the industry has sought to divest NMFS and FWS of authority over the regulation of marine mammals in captivity and to strip the MMPA of its long-standing emphasis on ensuring the adequate care and maintenance of marine mammals held for public display.

It was in pursuit of this goal that the industry lobbied for MMPA amendments in 1994 to weaken the law's protections over marine mammals in captivity. The 1994 amendments, however, did not go as far as the industry may have desired then or seeks to portray now. In fact, the Act retains its fundamental policy goals of not only protecting and recovering wild populations and promoting the health and stability of the marine environment, but also requiring the protection and humane treatment of individual marine mammals, including those in captivity.

The MMPA does not limit its protection to species, population stocks, and habitat. The law also protects individual marine mammals. Some of the examples found in the MMPA of this concern for the welfare of individual marine mammals are as follows (emphasis added):

- The prohibitions set forth in section 102(a) of the Act which make unlawful the unauthorized taking of "any marine mammal" by anyone subject to **U.S.** jurisdiction. 16 U.S.C. § 1372(a).

- The prohibitions in sections 102(b) and 102(c) on the unauthorized importation of *"any* marine mammal." Id. § 1372(b),(c);

- The policy goal, which recognizes that marine mammals "move in interstate commerce" (which clearly covers animals held in public display facilities) and are therefore subject to the Act's "protection." Id. § 1361(5);

- The definition of "marine mammal," which means "any mammal" adapted to the marine environment. Id. § 1361(6);

- The definition of "take" to mean to "harass, hunt, capture, or **kill,** or attempt to harass, hunt, capture, or kill *any* marine mammal." Id. § 1361(13);

- The definition of "humane" as taking "which involves the least possible degree of pain and suffering practicable to the mammal involved." Id. § 1361(4); and

- The requirement under section 104(b)(2)(B) that all permitted taking and importation be conducted in a "humane" manner, that is, as defined in section 3, that method of taking "which involves the least possible degree of pain and suffering practicable to the mammal involved." Id. § 1374(b)(2)(B).

Protection for individual marine mammals also is found in the permit issuance process of sections 101(a)(1) and 104. These permits, which are available for taking or importation of *"any* marine mammal" for scientific research, public display, photography, and species enhancement purposes, are subject to terms and conditions designed to protect the animals involved. Id. §§ 1374(b)(2)(D), 1374(c)(1). As Congress stated its intent in 1971:

> Scientific research permits or permits for the display of marine mammals by profit and non-profit institutions must be issued by the Secretary subject to his requirements for the manner in which those animals may be captured, transported and cared for. These permittees must also report to the Secretary on the way these requirements have been carried out.

S. Rep. No. 92-863, 92d Cong., 2d Sess. 17 (1971).

These are just a few examples of provisions in the MMPA that focus on the welfare of individual marine mammals. It is this emphasis on the protection of individual marine mammals, invested in the Act since its inception, that serves as the statutory foundation for NMFS' proposed regulations and the agency's continued involvement in the regulation of marine mammals in captivity.

The legal mechanisms to be used to carry out these MMPA goals and requirements are found throughout the Act. Section 112(a) confers upon NMFS and FWS wide latitude to "prescribe such regulations as are necessary and appropriate to carry out the purposes" of the Act. Id. § 1382(a). NMFS is, of course, accorded considerable discretion in constructing regulations to achieve these statutory goals. See Strong v. United States, 5 F.3d 905, 906-907 (5'' Cir. 1993) (upholding NMFS regulations prohibiting the feeding of marine mammals in the wild as reasonable and within agency authority under the MMPA), citing Chevron, USA, Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837, 841-44 (1984) (holding if Congress has not "directly spoken to the precise question" at issue, deference must be given to the agency's interpretation of its governing statute if its interpretation is "reasonable"); United States v. Clark, 912 F.2d 1087, 1090 (9th Cir. 1990) (upholding FWS regulations under MMPA, stating "we must show deference to the interpretation by the agency charged with a statute's interpretation"), cert. denied, 498 U.S. 1037 (1991).

Thus, under section 112(a), NMFS is entitled to set forth interpretations of what is required to advance the goals of the Act and promulgate regulations for that purpose.

Considering this express rulemaking authority and the emphasis in the MMPA on protecting individual marine mammals, it cannot be argued that NMFS lacks a basis upon which to promulgate regulations such as those that have been proposed. As Congress stated in reference to permits for "public and privately owned oceanariums" it was intended that "strict replations are to be imposed by this legislation on such practices." S. Rep. No. 92-863, supra, at 8 (emphasis added). The proposed NMFS regulations are generally consistent with that directive, even though, as EII points out in these comments, the proposed standards should be even more stringent. Although it is true of these regulations (as it is for most standards put out for public review), that improvements can be made through notice and comment, the fundamental objectives of the proposal are sound. Subject to the requested revisions discussed in these comments and the aforementioned concern regarding interagency coordination, EII supports the promulgation of these regulations.

NMFS' Role in Protecting, Marine Mammals in Captivity. In its testimony on MMPA reauthorization on October 11,2001, the American Zoo and Aquarium Association and the Alliance of Marine Mammal Parks and Aquariums ("the Zoo Alliance") criticized NMFS for overstepping its bounds in these regulations by

proposing standards regarding captive marine mammal care and maintenance. As the Alliance testified:

> However, in the 1994 Amendments, Congress decided it was wasteful for two agencies to have identical responsibilities and that the public display community should not be subjected to double jeopardy by having two different agencies enforcing care and maintenance standards. Therefore, Congress determined that APHIS would have sole authority over the care and [sic] of animals public display facilities. Nevertheless, the Proposed Regulations resurrect the rejected 1993 approach by giving NMFS joint responsibility to enforce APHIS' care and maintenance standards.

Testimony of George Mannina on behalf of the Zoo Alliance, at http://resourcescommittee.house.gov/107cong/fisheries/2001oct11/mann.htm. As the Zoo Alliance further stated "Congress clearly provided that the establishment and enforcement of marine mammal care and maintenance standards is APHIS responsibility." Id. The Zoo Alliance believes "the 1994 Amendments provided that when NMFS issues a public display permit, NMFS' responsibility is restricted to determining whether the public display facility 'is registered or holds a license' issued by APHIS pursuant to the Animal Welfare Act." Id.

The Zoo Alliance is incorrect. The 1994 amendments did not so seriously weaken the MMPA, despite the concerted effort of the public display industry to achieve that result, as to eliminate NMFS from any role of marine mammal care and

maintenance. To the contrary, important regulatory functions remain after "NMFS issues a public display permit.''

Before turning to the specifics of the MMPA that confer upon NMFS the authority to not only promulgate regulations such as have been proposed but also to remain involved in care and maintenance issues, it is necessary to understand the differences between the MMPA, which NMFS administers, and the AWA, which APHIS administers.

These are not duplicative statutes. They address different Congressional priorities. The policy objectives and goals of the MMPA do not end when the door to the transport cage is closed, and NMFS' legitimate role in the regulation of marine mammals in captivity persists beyond the point of capture or import. EII does not believe that NMFS should duplicate APHIS efforts or micromanage public display facilities. However, legitimate MMPA concerns continue to follow marine mammals after they have been removed from the wild, imported, exported, or given birth. Congress may have intended to "rein in" NMFS in the 1994 amendments, but it did not intend to abandon the Act's longstanding concern over the welfare of marine mammals held in captivity.

The MMPA is a sweeping, highly protective law that is concerned with all aspects of marine mammal conservation. It constructs a comprehensive program that

not only prohibits take and importation (except under narrow exceptions), but also establishes a scientific research program, promotes public education, fosters international cooperation, authorizes habitat acquisition, regulates commerce in marine mammals, and seeks a healthy and stable marine environment. The MMPA, as interpreted by the D.C. Circuit, is to be applied "for the benefit of the species rather than for the benefit of commercial exploitation." Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141, 1148 (D.C. Cir. 1976). Commercial exploitation, of course, covers the use of marine mammals at zoos and aquaria.

Lnherent in the very fact that an MMPA exists is the recognition by Congress and the American public that marine mammals are unique and deserving of special protection. There is no other class of animals that is subject to its own law of such broad application and sweeping significance. Explicitly acknowledging the uniqueness of marine mammals, the House Merchant Marine and Fisheries Committee declared when enacting the MMPA:

> Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals . . . have only rarely benefited from our interest; they have been shot, blown up, clubbed to death, rundown by boats, poisoned, and exposed to a multitude of other indignities, all in the interests **of** profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.

H.R. Rep. No. 92-707, 92d Cong., 1st Sess. **11-12** (1971). In response to this history of abuse, Congress fashioned the MMPA as a law that "would have the effect of placing the United States in the forefront of the development of effective and meaningful measures for the protection of marine mammals." Id. at **14.** Marine mammals in captivity are a part of this equation.

One of the distinguishing features of the MMPA is its requirement to act conservatively in favor of protecting marine mammals. The House Merchant Marine and Fisheries Committee expressed its intent to "build such a conservative bias into the legislation here presented." Id at **24.** The Senate expressed the same view, when it stated, "[o]ur knowledge of marine mammals is not nearly great enough for either proper conservation or commercial utilization as we have known it in the past." S. Rep. No. 92-863, supra, at 6. As a result, through the MMPA, Congress elected to "[adopt legislation] to require that we act conservatively – that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known." H.R. Rep. No. 92-707, supra, at 15. The courts too have adopted this precautionary principle under the MMPA, asserting that the .Act's mandate requires federal agencies "to proceed knowledgeably and cautiously." Committee for Humane Legislation. Inc. v. Richardson, **470** F. Supp. **423,428 (D.D.C.** 1979).

Thus, under the **MMPA,** Congress has enacted a law dealing specifically with marine mammals. The law is protectionist in approach. It adopts the precautionary principle to require conservative judgments that err on the side of protecting marine mammals. It is concerned with the welfare of individual marine mammals, as well as populations. And, with respect to animals held in captivity, it details specific requirements, confers broad, discretionary, permit conditioning power on NMFS and FWS, specifically mandates humane treatment under a stringent statutory definition, and carries out the intent of Congress that, with respect to "oceanariums," NMFS and FWS are to develop "strict regulations." **S.** Rep. No. 92-863, supra, at 8.

By comparison, the **AWA** does not specifically address marine mammals. Nor is it anywhere near as comprehensive as the **MMPA.** The **AWA** covers numerous kinds of animals, varying from hamsters to whales. **Any** "warm-blooded animal" used for research or exhibition is covered. 7 U.S.C. § 2132(g). In addition, whereas the **MMPA** covers everything from the prohibition on taking and importation, to research, to education, to international cooperation, the **AWA** has a singular focus on insuring the humane treatment of animals used for research or exhibition. Id. § 2131. Rather than advancing the MMPA's strong protectionist message toward all marine mammals, including the direction to insure the "least possible degree of pain and suffering," 16 U.S.C. §§ 1374(b)(2)(B), 1362(4), the **AWA** is more generally concerned with the

important but less specific goal of according animals "basic creature comforts" for transportation and captivity. H.R. Rep, **No.** 91-1651, 91st Cong., 2d Sess. (1970), reprinted in 1970 **U.S.C.C.A.N.** 5103, 5104.[2] The AWA itself nowhere references marine mammals; they are covered by the Act as a result of regulations promulgated by APHIS.

Comparing these two laws, it is clear that Congress intended marine mammals to be treated separately. In fact, the MMPA was enacted in 1972, two years after the AWA. Had Congress intended to preclude regulation of care and maintenance from the domain of the MMPA, it could have done so. To the contrary, Congress inculcated into the Act specific directives and authorities relative to public display and, through legislative history, admonished the agencies to go forth and develop "strict regulations" for this purpose. In short, the AWA does not occupy the field of protecting marine mammals in captivity. It is concerned with only one small aspect of the problem (husbandry standards); the reminder of this field is left open for response by NMFS and FWS under the MMPA.

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[2] Unlike the **MMPA,** the **AWA** does not define the term "humane." The **MMPA** requirement for "humane" treatment survives the actual take from the wild and act of import and pervades subsequent activities involving the animal. Take includes capture, not just harassment in the wild. The "capture" of the animal, of course, persists throughout its maintenance captivity, thereby extending the humaneness requirement. The same *can* be said of importation. It is truly illogical to suggest that one of the fundamental principles reflected in the law enacted **by** Congress to protect marine mammals – humane treatment – ceases to apply at the doorstep of a public display facility.

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In 1988, Congress revisited the public display and scientific research provisions of the Act. In these amendments, Congress added the requirements that public display permit applicants must offer acceptable education or conservation programs and be open to the public. H.R. Rep. No. 100-970, 100th Cong., 2d Sess. 33-34 (1988); S. Rep. No. 100-592, 100th Cong., 2d Sess. 28-29 (1988). Under these amendments, Congress continued to express its view that the MMPA is directed at the activities of the public display industry. Indeed, these amendments were necessary to prohibit situations where marine mammals would be placed into display situations at private clubs or resorts not generally accessible to the public.

The fact that the MMPA has consistently covered the welfare of marine mammals in captivity is apparent in the public display industry's own past testimony. The public display industry has itself acknowledged the role of the MMPA in regulating the activities of zoos and aquaria regarding marine mammals in captivity. In 1973, for example, rather than arguing that it was inappropriate for NMFS and FWS to engage in the regulation of marine mammals in captivity, Sea World testified before Congress that such restrictions furthered the public interest and the welfare of marine mammals. As Sea World informed the House Committee on Merchant Marine and Fisheries:

> In our opinion, the carefully prescribed conditions and criteria whch the Act imposes on the Secretary before he can grant a permit sufficient[ly] prote[c]ts the legitimate interests of the public and marine mammals.

Oversight of the MMPA of 1972: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93d Cong. 78 (1973) (testimony of Sea World, Inc.). Thus, rather than contesting the role of the MMPA in regulating its activities, Sea World accepted the requirements of the Act applicable to the regulation of captive animals as positive and constructive.

In 1988, Sea World again expressed this view. As stated in written testimony by Jack O. Snyder, Sea World's President:

> Its passage [the MMPA] established the most stringent of animal welfare requirements for the care and treatment of animals maintained in captive environments. The responsibility for implementation of these programs rests jointly with the U.S. Department of Commerce -- National Marine Fisheries Service; U.S. Department of the Interior -- Fish and Wildlife Service; and U.S. Department of Agriculture -- Animal and Plant Health Inspection Service.

Sea World went on to note, with reference to the MMPA public display regulation program: "We believe that certain regulatory and enforcement policies require improvement. However, this is not to be interpreted as a suggestion that present regulations are inadequate or unworkable in carrying out the terms of the Act."

MMPA Authorizations: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 100th Cong., 361-62 (1988) (testimony of Jack O. Snyder). Thus, even in 1988 the public display industry conceded that the MMPA did, and should, cover the care and maintenance of animals in captivity, and that NMFS and FWS had a role in implementing those requirements.

In 1994, the public display industry shifted gears and, largely in reaction to proposed NMFS regulations with which they disagreed, argued for sweeping amendments to the Act. The MMPA captive maintenance programs that previously had been regarded by institutions such as Sea World as acceptable and important to the public interest had suddenly become a cause of major concern. These same objections have carried forward to the current proposed regulations, as reflected in the Zoo Alliance's recent testimony on the MMPA reauthorization.

Against this backdrop, it is necessary to consider the 1994 amendments and the extent to which they altered the Congressional regime that was established in 1972, reaffirmed in 1988, and has been applied over a more than twenty-year period, with the full knowledge of Congress, so as to confer NMFS/FWS with responsibility over marine mammals in captivity. As will be discussed below, the 1994 amendments have not wrought a fundamental change under the Act or a wholesale divestiture of

NMFS/FWS from responsibility for what happens to marine mammals when they are in captivity.

The 1994 amendments unquestionably imposed restrictions on the role of NMFS and FWS regarding marine mammals in captivity. Those restrictions, however, went nowhere near as far as the public display industry now argues.

Congress took three steps in 1994. First, it limited the definition of "harassment" to takes in the wild. The apparent purpose of this step was to clarify that "harassment" does not occur while an animal is in captivity.

Second, Congress removed the phrase "and after" from the conditioning power of section 104(c)(1). Apparently Congress intended to limit the ability of NMFS/FWS to impose supervision, care or transportation requirements subsequent to removal from the wild.[3]

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[3] It is questionable whether this amendment accomplished that result. Section 104(c)(1) still requires conditions to be imposed for the "methods of capture, supervision, care, and transportation whch must be observed pursuant to such taking or importation." 16 U.S.C. § 1374(c)(1) (emphasis added). The term "pursuant to," by itself, connotes a degree of continuing jurisdiction and control associated with any act of taking or importation. See John Allen Love Charitable Found. v. United States, 540 F. Supp. 238,243 (E.D.Mo. 1982) citing Old Colony Trust Co. v. Comm'r., 301 U.S. 379, 383 (1937) (quoting the dictionary definition of "pursuant to" as: "acting or done in consequence or in prosecution (of anything); hence; agreeable; conformable; following; according"); Trinity Universal Ins. Co. v. Cunningham, 107 F.2d 857, 861 (8th Cir. 1939) (interpreting "pursuant" as "acting or done in consequence of"); Hawkeye Casualty Co. v. Halferty, 131 F.2d 294,298 (8* Cir. 1942) (same). Thus, it can readily be argued that section 104(c)(1) confers power to issue conditions that, as being "pursuant to" take and import, cover actions that will occur later in time and after those events.

Third, Congress amended section 104(c)(2) to specify that three conditions must be met for a public display permit to be issued (i.e., valid education/conservation program; AWA license/regulation; publicly-accessible facilities) and that once a permit is issued, animals may be transferred to parties similarly qualified without additional permits.

These amendments are best described as "fine-tuning" changes to the manner in which the MMPA covers activities affecting marine mammals in captivity. No change was made to the sweeping policies of the Act, which include protection of marine mammals in captivity. No change was made to the broad rulemaking power of section 112(a), which includes the promulgation of standards relative to marine mammals in captivity. No change was made to the humane treatment requirement. No change was made to the general permit conditioning power of section 104(b)(2)(D). And no change was made to the overall precautionary, protectionist goal of the Act that extends to individual animals as well as populations.[4]

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[4] The Committee reports on the 1994 amendments nowhere suggest that it was the intent of Congress to remove NMFS/FWS from all aspects of marine mammal maintenance in captivity. H.R. Rep. No. 103-439, 103d Cong., 2d Sess. 31-32 (1994). The Senate Report does not even discuss the issue. S. Rep. No. 103-220, 103d Cong., 2d Sess. (1994). It was only in occasional floor statements that, for the first time, assertions were made that the MMPA and/or NMFS had no role in captive maintenance regulation. See, e.g., 140 Cong. Rec. E514 (Mar. 22, 1994) (statement of Rep. Manton) ("These amendments to the MMPA, therefore, clearly establish that the National Marine Fisheries Service has no role or authority to regulate the captive maintenance of marine mammals.") As discussed above, the 1994 amendments did not acheve so sweeping a change in the MMPA, and floor

Congress therefore has left intact, even after the 1994 amendments, key provisions of the Act that relate to public display and captive maintenance. These provisions not only provide the basis for regulations such as those subject to these comments but also extend NMFS/FWS into a variety of activities related to captive maintenance.

For example, as provided in section 104(c)(1), "[a]ny permit [issued for public display] shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care and transportation which must be observed pursuant to such taking and importation." 16 U.S.C. § 1374(c)(1). In addition, section 104(c)(1) requires that any permittee "shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority." Id. Finally, section 104(b)(2)(D) requires that "any permit issued under this section shall . . . specify . . . any other terms or conditions which the Secretary deems appropriate." Id. § 1374(b)(2)(D) (emphasis added).

These provisions continue to provide NMFS with broad authority under the MMPA over public display facilities. These provisions remain intact from the original

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statements of this nature by individual members of Congress are accorded little or no weight. 2A Norman J. Singer, Sutherland Statutory Conststruction § 48:13 (6th ed. 2000) (such statements "are generally held not to be admissible as aids in construing a statute"); Bath Iron Works Corn. v. Dep't of Labor, 506 U.S. 153 (1993).

MMPA and were left unscathed by the 1994 amendments. Particularly important is NMFS' blanket permit conditioning authority in section 104(b)(2)(D). This power is not limited in any respect and implements MMPA purposes and policies, including the goal of section 2(5) to protect marine mammals in interstate commerce, including animals at zoos and aquaria.

These permit conditioning powers authorize NMFS/FWS to impose a wide variety of permit requirements applicable to public display and captive maintenance. While it is fair to say that the specifications applicable to transportation and display facilities are within the province of APHIS, other important aspects of the activities involving such marine mammals remain subject to section 104 permit conditions. For example, a wide variety of non-invasive research is conducted on public display animals. Permit conditions related to such activities fall squarely under the MMPA and are not within the expertise of APHIS.

NMFS' continuing jurisdiction in this regard is confirmed by the reporting requirement of section 104(c)(1) "for all activities carried out" pursuant to the permit. Activities that occur after capture or importation are "carried out" pursuant to a permit. That information can inform a variety of legitimate actions of NMFS, including, for example, future terms and conditions under sections 104(b)(2) and 104(c)(1), and assessment of compliance with section 104(c)(2) criteria for permit issuance and

permit revocation. This reporting function, and NMFS' continuing jurisdiction post-capture/import is explained in the MMPA legislative history. As stated with reference to these section 104(c)(1) reports: "If the Secretary is not satisfied with these activities on these reports, he may take appropriate action which includes the revocation of permits and assessment of penalties." H.R. Rep. No. 92-707, supra, at 25. This reporting requirement can, and should, cover virtually any aspect of public display and captive maintenance programs.[5] Currently, NMFS requires only inventory information and transport notifications. More comprehensive reporting should be required.

Section 104(c)(2)(A) sets forth three criteria that must be met to obtain a public display permit (conservation/education program; AWA licensed or registered, facilities open to the public). However, issuance of the permit, even to a party who meets these tests, is not limited to these criteria. NMFS must consider other factors, as dictated by MMPA purposes and policies, as well as the humaneness requirement of section 104(b)(2)(B). These factors must, of necessity, consider the applicant's track record regarding marine mammal care and maintenance.

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[5] It is significant to note that Congress did not amend this reporting requirement in 1994, even though it is part of section 104(c)(1), which was amended with respect to permit conditioning power.

In addition to these considerations at the permit application stage, NMFS remains involved in care and maintenance after permit issuance. The aforementioned permit terms and conditions provide one such basis for doing so. The requirements of section 104(c)(2)(B), which specify that the same three factors applicable to permit issuance also apply to subsequent animal transfers, provide another instance in which NMFS must make a determination regarding whether such criteria are met. Under section 104(c)(2)(D), NMFS also must monitor the permitholder to ensure continued compliance with the three criteria. 16 U.S.C. § 1374(c)(2)(D). And, of course, any conditions included in the initial permit would carry forward to the new permitholder.

Finally, NMFS' continuing authority over marine mammals in captivity is provided by section 104(c)(10), which requires the agency to maintain a marine mammal inventory. This provision, which also expressly applies to the progeny of the permitted animals, yields information that can inform NMFS enforcement actions under permit terms and conditions, advise NMFS regarding whether future applications from that permitholder or transferee should be granted, and provide to the government and public a critically important database regarding the status of marine mammals held in captivity, including the cause of death. EII, of course, has a very strong interest in the welfare of all animals held in public display and other institutions. Although the public display industry may not want to share such

information, it cannot be denied that there is a strong public interest in facts pertaining to marine mammals held in captivity. These inventory reports, even as described in the NMFS regulations, are relatively simple and straightforward. Any minor inconvenience imposed upon the industry is more than compensated for by the public's right to know.

The problems inherent in the end result argued for by the industry are currently apparent in the example of the Suarez Circus in Puerto Rico and its maintenance of polar bears. Here, APHIS and the **AWA** have not proven to be up to the task of fulfilling the unique and strong objectives of the **MMPA. As** the record of the Circus' treatment of polar bears demonstrates, the system for attempting to remove the **MMPA** and its implementing regulations from the care and maintenance of captive animals can lead to horrendous results. The bears being subjected to the conditions at the Circus' travelling exhibit are clearly at **risk** and suffering. **A** permit never should have been issued to the Circus, and now that its inhumane practices and facilities have been exposed, its permit should be revoked and the animals seized. Yet, it appears that the AWA jurisdiction is serving as an impediment to solving this problem. Indeed, APHIS has conceded that "it is beyond the scope of the **AWA** to prohibit this practice [of maintaining arctic animals in a subtropical climate]." That is precisely the reason why

the MMPA must govern captive maintenance situations, and why a stronger role by the MMPA agency, FWS, is necessary.

Taken together, these MMPA provisions, and their associated legislative history, refute the argument that NMFS has no role over marine mammals in captivity. To the contrary, NMFS has important residual power in this regard, even after the 1994 amendments. EII is deeply troubled that NMFS appears to have retreated from this mandate and has failed to exercise its powers to fulfill this role in many respects. EII supports coordination between NMFS and APHIS and the avoidance of duplicative functions. While it is fair to say APHIS is responsible for the specifications of transportation and display facilities, NMFS still has broad powers and mandates.

If the laws covering marine mammals in captivity are viewed as concentric circles, APHIS and the AWA could be said to occupy a small core circle that concerns facility specifications. Outside that core are numerous other circles, covering other responsibilities that arise under MMPA purposes, policies, and requirements. These circles are the domain of NMFS/FWS/MMC and the MMPA. From EII's perspective, NMFS and FWS have, to a large extent, vacated these important outer concentric circles covering marine mammals in captivity. The proposed NMFS regulations are one small step to fill the void, but as discussed in these comments, more aggressive and comprehensive action is necessary. The regulatory regime envisioned by the Zoo.

Alliance, too often yielded to by NMFS since 1994, does not reflect the reality of the MMPA.

Foreign Facilities. According to the Zoo Alliance, the proposed regulations raise the question of the degree to which NMFS can become involved in activities at foreign facilities. For the most part, EII considers this issue a "red herring" in the context of these proposed regulations.

It is, unfortunately, the case that the MMPA does not confer jurisdiction over actions in foreign countries. EII would support broader authority in this regard applicable to all facilities in foreign countries. However, because that result appears unlikely, these comments assume the absence of MMPA jurisdiction abroad.

While it is true that NMFS does not have authority to regulate activities in foreign countries, including those of **U.S.** citizens, it does not follow that the agency has nothing to say about the quality of care provided at such facilities. To the contrary, the MMPA requires that NMFS must ensure the welfare of marine mammals maintained at foreign facilities. That is an action that must be taken before the animals leave the United States.

With regard to export, two MMPA requirements are clear. First, a public display permit to take animals found within U.S. jurisdiction may not be issued

outright to a foreign facility. Section 102(a)(4) prohibits marine mammal exports, except pursuant to a special exception permit under section 104(c).

Section 104(c)(2)(A) authorizes public display permits for taking or importation to be issued when, inter alia, three criteria are met, including certification that the permit applicant has an **AWA** license or registration. 16 U.S.C. § 1374(c)(2)(A). Because foreign facilities cannot obtain such **AWA** license/registrations, they cannot receive permits for take. Thus, foreign facilities cannot take marine mammals under United States jurisdiction.

In the case of export from a U.S. facility which holds an MMPA permit, section 104(c)(2)(B) applies. This provision includes the same three criteria as section 104(c)(2)(A). Because foreign facilities cannot obtain an MMPA license, they must satisfy the comparability requirements of section 104(c)(9) if they are to receive animals via transfer from preexisting permitholders. This section expressly authorizes "export" to such facilities, but not "take." Thus, even though no permit to take from the wild can be issued, export from a U.S. facility holding a permit is allowed when comparability is established. Section 104(c)(9) requires that the "receiving facility meet[s] standards that are comparable to the requirements that a person must meet to receive a permit under this subsection for that purpose." Id. § 1374(c)(9). NMFS must therefore make a "comparability finding in these instances."

The manner in which NMFS makes this finding is committed to agency discretion. And, under section 112(a), NMFS is within its rights to promulgate regulations for this purpose.

EII agrees with NMFS that comity letters from foreign governments are one way to address comparability. However, such letters do not go far enough. They merely ensure that the foreign country involved enforces requirements equivalent to U.S. standards. In addition, NMFS must be able to determine that the facility itself meets the standards of section 104(c)(2)(A). This burden can best be met by requiring information directly from the receiving entity, as is done for domestic facilities. The regulations also should require pre-transfer and pre-export onsite inspection by U.S. officials or designated parties. The cost of such inspections should be paid by either the shipping facility or the receiving facility. In the United States, APHIS conducts preliminary inspections of domestic facilities. Absent such inspection, there is no reliable way to ensure the facilities are up to AWA standards. The same holds true for foreign facilities.

In the event the facility fails to comply in the future, NMFS is granted the power, under section 104(c)(2)(D), to take appropriate enforcement action, including seizure of the animal. Because activities in foreign countries are involved, moreover,

the comity letter becomes crucial. In this situation, it is necessary to invoke the assistance of the government of the foreign country involved.

On these grounds, it is clear that NMFS does not abdicate all responsibility for marine mammals when they leave the United States. The duty to protect those animals exists, but the means to effectuate that duty are limited when the marine mammals are located in foreign countries. Before they are exported, when all U.S. authority continues to apply, NMFS therefore must ensure that the comparability requirements of section 104(c)(9) are satisfied. After export, the receiving facility must still be monitored to ensure that comparability is maintained. Here, NMFS must again rely upon the United States' comity relationshp with the foreign country to carry out any actions necessary to satisfy MMPA requirements. EII's specific comments on the comity and export requirements of the proposed regulations are set forth in the next section.

Comity also can be viewed as an end unto itself. Comity agreements have independent utility as a way to bring foreign governments into the MMPA regime, whch is among the foremost objectives of the Act as set forth in sections 2(4) and 108. Id. §§ 1361(4), 1378. EII is aware of no foreign governments that have balked at such letters. Getting foreign nations to agree to carry out MMPA-comparable laws to protect marine mammals should be viewed as an extraordinarily positive and effective

way to advance domestic marine mammal protection initiatives abroad. They can be used to place the United States "at the forefront" of international marine mammal conservation efforts. H.R. Rep. No. 707, supra, at 14. In this regard, comity letters should be strongly promoted and encouraged.

It also has been EII's experience that, to maximize the effectiveness of comity letters, NMFS and FWS need to work cooperatively with foreign governments once they have been issued. NMFS/FWS should seek to bring foreign governments to a point where they conduct effective oversight for facilities under their jurisdiction.

EII's experience with Keiko is a good example of how comity should and should not work. EII is a part of the Keiko reintroduction project. By working cooperatively with NMFS and the Icelandic government, a comity agreement was developed with Iceland, a country not known for its progressive attitude toward marine mammal conservation. Despite its past track record in support of commercial whaling, Iceland agreed to implement legal requirements comparable to U.S. laws. Iceland even promulgated its own care and maintenance regulations and exercised oversight responsibility under those standards. The Icelandic program regarding Keiko has worked extraordinarily well. This example is truly a success story of advancing U.S. marine mammal conservation policies abroad through comity

Although this comity relationshp got off to a positive start, NMFS eventually became too involved in the details of the Keiko project. This interference threatened to undermine the comity arrangement. That relationship is now strong and working well again, but NMFS must strike a careful balance between promoting cooperative international conservation efforts, ensuring comparability at foreign facilities, and avoiding undue interference with the sovereign affairs of counties that are meeting their comity obligations.

Captive Release. EII supports the requirement for a permit or similar authorization to release captive marine mammals. We acknowledge that there is a risk that irresponsible or unduly risky actions will be taken without such approval.

However, EII objects to two aspects of the NMFS captive release proposal. First, EII believes that NMFS misstates the current understanding regarding the prospect for successful release in its preamble discussion on page 35210. NMFS creates the impression that captive release is an unattainable goal without support in the scientific community. This may be NMFS' view, but it does not reflect a consensus view of the marine mammal community, overlooks the opinion of credible experts, and disregards examples of successful release and reintroduction programs. EII therefore requests that this preamble discussion be revised to read:

> From a scientific perspective, the release of captive marine mammals is considered by some to be experimental. There are some scientists who question the effect of time in captivity on marine mammals' ability to survive in the wild. There are others who believe that, when properly undertaken and monitored, captive release can be a benefit to the animal involved. Captivity can affect marine mammals ability to forage in the wild, avoid predators, integrate with wild stocks, and avoid interactions with humans and vessels. A proper release program, however, may be able to address these **risks.** Additionally, release sometimes poses risks to wild stocks . . . .

Second, NMFS must avoid its continuing "double standard" on captive release. While the NMFS seems to feel free to be critical and pessimistic of such prospects when release from a public display situation is involved, the agency is more than willing to look the other way when such programs are undertaken by the Navy or for "recall training" purposes, as discussed on page 35211. NMFS needs to adopt a consistent, objective, and analytically sound position regarding captive release. It should recognize that such a goal is attainable, when carefully and responsibly conducted, and apply the same stringent requirements to the Navy

EII objects to the NMFS approach of suggesting it is acceptable to release captive marine mammals for purposes of pinger recall training but not for return to the wild. Both such activities present essentially the same risks, and both can be acceptably carried out under properly developed programs and supervision.

Finally, if releases will be authorized under conditions for recall purposes, releases also should be allowed for routine "ocean walks" when that activity would be for the benefit of the animal involved. Such activities can be routinely undertaken to benefit specific animals, as the experience with Keiko has demonstrated. Keiko has, over a two year period, undertaken numerous lengthy and successful ocean walks during whch he has interacted with wild populations on many occasions. Ths has become part of h s nature, and he has, in effect, been successfully reintroduced to the wild, disproving many of the concerns stated by NMFS in the preamble. Ocean walks of this nature may also be appropriate for other animals, so long as certain conditions are met (i.e., healthy animal, in native waters, with qualified staff). Under these circumstances, there is no reason such walks should not be allowed.

SPECIFIC COMMENTS

Page 35210, Captive Release: **As** noted above, NMFS' discussion of captive release is too limited and parochial. It does not reflect reality, the current understanding of release possibilities, or the views of credible experts in the field. The revisions recommended above should be adopted. Or, at the very least, NMFS should qualify this statement by acknowledging that the views offered are those of the agency alone. In addition, it should be noted that the Conference Report on the Department of

Defense Appropriations cited in the preamble is only non-binding legislative history and does not have the force of law.

Page 35212, Facility Other Than Applicant's: The preamble discusses circumstances under which marine mammals can be held at facilities other than those of the applicant. EII objects to this approach. Section 104(c)(2)(A) provides that a permit may be issued "only to a person wh ch the Secretary determines . . . maintains facilities for the public display of marine mammals." 16 U.S.C. § 1374(c)(2)(A) (emphasis added). Ths provision necessarily ensures that the facilities involved must be the applicant's. To allow otherwise would create the potential for shifting marine mammals to facilities that do not meet all of the statutory criteria.

Page 35212, Documentation of Public Access: NMFS proposes that the section 104(c)(2)(A) requirement that a facility is "open to the public on a regularly scheduled basis" can be satisfied merely by submitting "a brochure, flyer, or other publicly distributed document." This approach is too lax and too easily fabricated. NMFS should require a higher standard of proof, such as a sworn statement, governmental verification, inspector's report, or reliable third **party** investigation.

Page 35212, Captive/Importation Practices: NMFS states that capture or importation must be from a source that will have the least possible effect on wild populations, will be consistent with quotas, and will not have an adverse impact on the

species or stock. EII approves of these requirements. In addition, NMFS must include the requirement of section 104(b)(2)(B), which mandates that the take or import must be "humane," as defined by the Act.

Page 352 12, Re-export: NMFS needs to clarify that re-export, as described in this section to accommodate "temporary public display" or "breeding loans," must still meet the three criteria of section 101(c)(2)(B).

Page 35212, Transport on Transfer Notifications: The preamble states that a new transport notification must be submitted "if the species to be transported changed or increased." EII regards such transfers to be animal-specific, not just generalized as to "species." Such specificity is necessary to ensure that individual **animals** are tracked and their special needs addressed. Therefore, it is necessary to require a new notification when the animals involved are changed.

EII also objects to an exception to the 15-day notification requirement for a "time critical business opportunity." The law is clear that no such exception is allowed, and "business needs" do not override marine mammal protection actions

under this law. Id. § 1374(c)(2)(E). There is no legal authority for such an exception, and it must be eliminated.6

Other aspects of the proposed transfer arrangement, including the use of MMTN form and the verification of receipt are reasonable and supported by EII.

Page 352 13, Reporting: EII supports the reporting requirements of these regulations as a minimum requirement. We would prefer to see more extensive reports, however. These requirements essentially cover only the inventory of section 104(c)(10). NMFS is authorized to require reports for any activities undertaken pursuant to a permit by section 104(c)(1). EII requests that reporting also be required for information on research conducted incidental to public display, serious health-related problems for the animals, necropsy reports, problems with the facilities, etc..

Page 3513. Role of ISIS. EII is opposed to NMFS yielding its lead responsibility for the database to ISIS. Such an action could make it more difficult for EII or other entities to obtain data about public display entities and their practices. For

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6 The MMPA does recognize the possible need for expedited action for animal welfare, so the medical need exception is valid. See id. §§ 1372(b), 1378(h). Such transfers should be pursuant to . government authorization.

example, **ISIS** may not be subject to FOIA. NMFS is free to consult and cooperate with ISIS, but the MMPA duties of the agency cannot be shifted.

Page 35214, Seizure of Marine Mammals: EII believes that seizure of marine mammals is appropriate in certain circumstances. In such circumstances, priority consideration must be given to the care and maintenance of the animal involved. This primary objective needs to be discussed in the regulations.

Hybrids. NMFS needs to clarify that "hybrid" marine mammals (e.g., crosses between dolphin species) are covered under all aspects of these regulations. The MMPA covers "all marine mammals," Id. § 1362(6), and hybrids must not be allowed to fall through a loophole.

Page 35215. section 216.13: This section should be amended to allow for ocean walks of individual marine mammals when appropriate for the welfare of the animal involved. **A** new subsection should be added to allow for such activity when a showing is made that the walks will not be for public display purposes, will be in furtherance of the best interest of the animal, and will be subject to adequate monitoring and support. Ocean walks for this purpose would be supplemental to those conducted for scientific research.

Subsection (g) should be clarified that not just any person can be authorized by the Secretary to "implement or enforce" the regulations. Instead, only authorized governmental parties should be vested with such power.

Page 35215, Section 216.27: If a rehabilitated non-releasable animal is to be maintained in captivity, it must be subject to full permit review, not the abbreviated process described in this section. The MMPA affords full protection to these animals, and the public review process should not be shortchanged by suggesting that less than full permitting is required to put these animals on public display. In addition, EII is opposed to the retention of releasable stranded animals for public display. Rescued animals that recover should be returned to the wild, not committed to live in captivity. As the Zoo Alliance has testified, it has not needed to capture wild marine mammals for years due to its breeding program. Thus, there is no need to retain releasable animals in captivity.

Page 35215. Section 216.43(a)(3): EII agrees that "intrusive research" on an animal held for public display should not be allowed without a scientific research or enhancement permit.

Page 35216. Section 216.43(4): EII supports widespread use of inspection. It is our experience that agency resources are not adequate for this purpose. We also recognize, however, that unqualified individuals should not be used for this purpose.

This can be addressed by setting up a mechanism for inspection authorization pursuant to section 112(c), which contemplates the use of "public or private institutions" to carry out MMPA provisions. Appropriately qualified individuals associated with institutions should be used for this purpose.

Page 35216, Section 216.43(b): This provision would limit the take prohibition to "capture" situations. The definition of take is broader than capture, and all forms of take or attempted take must be covered.

Page 35216, Section 216.43(b)(3): The proposed issuance criteria are not stringent enough. As discussed above, the three criteria in section 104(c)(2)(A) are a minimum. NMFS also needs to require that the animals will be maintained in humane conditions and that the permit applicant demonstrate an adequate record of compliance with the AWA and MMPA and any previously issued permits, as necessary to satisfy MMPA purposes and policies. No program or facility with a track record of serious problems should be issued a new permit. In addition, travel shows are, by definition, inhumane and should not be permitted.

The test for impacts on populations in subsection (iv) also is not sufficient. The issue is not whether the permit has the "least practicable impact" on a wild population. Such an impact, even though "the least practicable" could still be unacceptable or to the disadvantage of the population. The "least practicable" test assumes that the take

should occur and should simply be mitigated. This test leaves no room for rejecting a permit that would disadvantage or adversely affect the population, as required by the MMPA. In addition, all capture and removal from the wild must be humane, as defined by the MMPA. The appropriate test should be "will not adversely impact or disadvantage the wild population and will have the least practicable impact."

Page 352 16, Section 216.43(b)(5): Subsection (viii) provides that permit conditions are effective "as long as the permit holder maintains custody of the marine mammal." This provision should be clarified to explain that the permit conditions also follow the animal to any transferee.

Page 35219. Section 216.43(f): These regulations should be revised to clarify how judgments will be made for compliance with section 104(c)(2)(A)(i) regarding a program for education or conservation. In particular, the regulations should provide that such an export is not authorized if the facility involved engages in practices, even for species other than those to be captured, that violate MMPA policies and goals or practices prevalent in the United States. For example, certain Japanese facilities participate in "drive fisheries" to capture dolphins. This practice is disdained in the United States and would not be allowed under the MMPA. Any facility engaging in such a practice should not be allowed to receive marine mammals from the United States.

Page 352 19, Section 216.43(g): Seizure may be necessary in circumstances other than those specified in this section. The regulations seek to limit seizure to the circumstances in section 104(c)(2)(D) (inadequate education/conservation program; facilities not accessible to public). The Act does not limit seizure to these circumstances, and broader authority is necessary. Seizure should be authorized under circumstances that "include, but are not limited to" the factors already listed, as well as "failure to maintain the marine mammal in a humane manner, serious or repeated violations of **AWA** standards, and serious or repeated violations of permit terms and conditions." Seizure also could be appropriate if mortality rates are high, suggesting inhumane conditions, if necropsy reports suggest communicable disease or outbreak, and if there are documented staff problems (i.e., strike) that make it impossible for the facility to care for the animals.

RESPONSE TO ZOO ALLIANCE

In its October 11,2001 testimony on MMPA reauthorization, the Zoo Alliance set forth several comments on the NMFS proposed regulations. EII responds to these comments as follows. Each relevant Zoo Alliance statement is set **forth,** followed by EII's response.

Zoo Alliance comment: With respect to non-depleted species, the Proposed Regulations provide that unless NMFS has established a removal quota, the applicant

for a take permit must demonstrate that the taking "will not have, by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect" on the species. Proposed § 216.43(b)(3)(v)(B), 66 Fed. Reg. at 35216. However, existing regulations already require a permit to demonstrate that any taking "by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock. . . ." 50 C.F.R. 216.34(a)(4).

The public display community does not object to the existing regulations. But the Proposed Regulations significantly change the existing standard and create an impossible burden to meet. Unlike the existing regulations which require a showing that the taking is not "likely" to have a significant adverse effect on the species, the Proposed Regulations require that the public display community prove a negative i.e., that the taking "will not have" a significant adverse effect. Moreover, the Proposed Regulations now require that you prove a negative not only with respect to "direct" effects but also with respect to what NMFS calls "indirect" effects.

Not only do the Proposed Regulations establish standards which are virtually impossible to meet, but if a person tries to meet the standard, NMFS creates still more obstacles because the Proposed Regulations allow NMFS to require public display facilities to undertake extensive, expensive and time consuming research to gather and analyze population level information and to evaluate every other direct or indirect take

or source of mortality. The Proposed Regulations are quite specific that NMFS' decision on whether to allow the taking is to be based on the best available information "including information gathered by the applicant." This last clause allows NMFS to require an unending gathering of new information in order to satisfy whatever information thresholds NMFS may establish.

The public display community does not object to the existing requirement that it demonstrate that any removal from the wild is not likely to adversely affect the population at issue. The community does object to the wording in the Proposed Regulations moving the goalposts and permitting NMFS to insist on dormation gathering which allows NMFS to move the goalposts again by requiring new studies before NMFS can make a decision.

EII Response: This is not a valid concern. It is a standard approach under the MMPA to require parties who seek to take marine mammals to prove, just as proposed here, that the activity will not have adverse effects on populations. Under section 101(a)(5), for example, the applicant for a small take authorization must prove that the requested take will "have a negligible impact on the species or stock." That applicant also must prove the take "will not have an unmitigable adverse impact on the availability of such species on stock for taking for subsistence uses." 16 U.S.C. § 1371(a)(5)(A)(i). The same showings must be made for takes by harassment. Id.

§ 1371(a)(5)(D)(i). Under section 103, permit applicants must prove that their takes will not result in disadvantage to the species or stock. Id. § 1373(a).

It also is abundantly clear that Congress intended the burden of proof to be on the party seeking to exploit marine mammals. As stated in the MMPA legislative history: "If that burden is not carried - and it is by no means a light burden - the permit may not be issued." H.R. Rep. No. 92-707, supra, at 18. The courts have affirmed this principle. See, e.g., Committee for Humane Legislation v. Richardson, 540 F.2d 1141, 1145, n. 11 (D.C. Cir. 1976) (quoting the H.R. Rep. No. 92-707, supra, with emphasis added).

Zoo Alliance comment: A clear example of NMFS' moving the goalposts is found with respect to depleted species. The MMPA prohibits the taking of any depleted species. 16 U.S.C. § 1372(b)(3). The Proposed Regulations, include the statutory prohbition but then go on to amend the MMPA by also prohibiting the taking of animals from a species which is "proposed by NMFS to be designated as depleted . . . ." Proposed § 216.43(b)(4)(iii)(A), 66 Fed. Reg. at 35216. Even the Endangered Species Act does not have a provision like that which NMFS is trying to insert into the MMPA. Significantly, NMFS does not impose upon itself any time limit for reaching a final decision on its proposal to designate a species as depleted.

EII Response: The ESA does in fact include protection for species proposed to be listed. The "conference" requirements of section 7(b)(4) apply to proposed species. 16 U.S.C. § 1536(b)(4). Moreover, under the ESA, species do not receive most of the Act's protections until they are listed. Under the MMPA, all marine mammals are protected, and it is appropriate to prohibit any take for public display for those populations at risk of depletion, the avoidance of which is a principal purpose of the Act. Time frames for depleted determinations with respect to petitions are set forth in section 115(a)(3) of the Act. 16 U.S.C. § 1383(b). Given the precautionary principle reflected in the Act and the strong mandate to avoid depleted status, it is an entirely reasonable exercise of NMFS' authority to decline to approve takes from a stock under consideration for such status.

Zoo Alliance comment: The 1994 Amendments provide that a person issued a permit to take or import marine mammals for public display shall have the right "without obtaining any additional permit or authorization" to sell, transport, transfer, etc. the marine mammal to persons who meet the MMPA requirements. 16 U.S.C. § 1374(c)(2)(B). The MMPA also provides that a person exercising these permit rights must notify the Secretary of Commerce no later than 15 days before any sale, transport, etc. 16 U.S.C. § 1374(c)(2)(E). However, the Proposed Regulations ignore

the simple and direct process contained in the statute and resurrect elements of the 1993 proposed "simplification" that Congress rejected.

Not only do the Proposed Regulations require that the shipping facility provide the statutorily required 15-day transport notice, but the shipping facility must also submit a complete Marine Mammal Data Sheet ("MMDS") for each mammal to be transferred. Proposed § 216.43(e)(1)(i), 66 Fed. Reg. 35217. The MMDS gives the animal's official NMFS identification number, name, sex, age, origin, etc. -- dormation already held in the NMFS inventory. The Proposed Regulations go on to state that in addition to receiving a transport notification and MMDS from the shipping facility, NMFS must also receive a transport notification and another MMDS for the marine mammal from the receiving facility. Id. After the transfer occurs, the receiving facility must confirm the transport and submit yet another MMDS. Proposed § 216.43(e)(2), 66 Fed. Reg. at 35218. Thus, a single 15-day notification required by the statute has been transformed into the submission of three transport notifications for the same transaction and three MMDS forms restating the dormation already in the inventory.

EII Response: These concerns are, to put it frankly, making a mountain out of a molehill. The MMDS form is simple. Requiring verification from the receiving facility is simple. Both actions are consistent with the 1994 amendments. The

amendments do not say only one form shall be used. While it may be possible for NMFS to simplify this process even further, the forms involved are hardly complicated or time-consuming. This complaint by the Zoo Alliance is hypertechnical and appears to be nothing more than a stalking horse for more MMPA amendments.

Zoo Alliance comment: Moreover, the Proposed Regulations require that before a transport can occur, both the holder and the receiver must provide NMFS with a certification that the receiver meets the requirements of § 216.43(b)(3)(i)-(iii) of the Proposed Regulations. Proposed § 216.43(e)(1)(i), 66 Fed. Reg. at 35217-18. As noted above, these provisions include requirements that a facility have a conservation or education program, have an APHIS license or registration, be open to the public and be in compliance with all APHIS requirements. However, the Proposed Regulations make persons subject to civil or criminal penalties for submitting false information. Proposed § 216.13(g), 66 Fed. Reg. at 35215.

Read together, these provisions mean that a shipping facility is now subject to penalties if NMFS finds, for example, that the receiving facility is not in full compliance with APHIS standards. It is not clear why an APHIS determination of compliance with APHIS requirements is not adequate and why the shipper and receiver must provide an independent certification, particularly when the MMPA says the transfer may occur without further permit or authorization.

EII Response: This is not an accurate reading of the proposed regulations. The shipping facility is responsible for its own certification, not the receiving facility. It also is reasonable to require these certifications. APHIS is unable to maintain constant status updates on all facilities. This approach actually comports with the industry's desire to "regulate itself." **A** preferred approach from EII's perspective would be for NMFS to verify this information independently, but surely the Zoo Alliance would claim this approach violates the 1994 amendments.

Zoo Alliance comment: Finally, after erecting the regulatory regime described above, the Proposed Regulations state that any public display permit issued by NMFS shall "contain other conditions deemed appropriate" by NMFS, a catchall provision apparently authorizing NMFS to issue any additional requirements it might think appropriate. Proposed § 216.43(b)(5), 66 Fed. Reg. 35216. Although such a provision might seem a reasonable contingency for most agencies, given NMFS' history, it is a provision about which significant questions must be raised because, in the past, NMFS has not exercised its authority judiciously.

EII Response: **As** discussed at length above, such authority to condition permits is expressly provided by section 104. EII agrees that NMFS has not "exercised its authority judiciously," but this is because this agency has been too permissive and lax on the public display industry.

Zoo Alliance comment: Although the preceding are the major issues, there are a number of other issues in the Proposed Regulations which are of concern. For example, Congress intended that the marine mammal inventory be a record of animals actually held at public display facilities. As noted above, there are serious questions about whether the inventory serves any regulatory purpose. That said, if the inventory is to be a record of marine mammals held at public display facilities, its only valid purpose can be with respect to living marine mammals. It is neither appropriate nor necessary that the Proposed Regulations require facilities to report stillbirths since such animals will not become part of the inventory of animals at public display facilities. See Proposed § 216.43(e)(4)(vii), 66 Fed. Reg. at 35218. The issue regarding stillbirths is with respect to genetics and public display facilities already report stillbirths to these persons who maintain these genetic records.

EII Response: The death of a marine mammal in captivity is an important event that needs to be recorded, explained, and possibly investigated. Such deaths are a matter of great concern to EII and the public. They can be indicative of whether a facility is treating an animal humanely, and whether there are recurring causes of mortality that need to be resolved. Stillbirths are also of concern, as they can be indicative of the well-being of the mother giving birth or problems at a facility contributing to such a result, especially if this is a repetitive problem.

Zoo Alliance comment: A review of the Proposed Regulations shows NMFS is attempting to resurrect regulatory proposals already rejected by Congress. NMFS is also attempting to amend the MMPA by inserting provisions nowhere found in the statute. Further, NMFS is adopting new legal interpretations which are not even in the Proposed Regulations but which reverse longstanding understandings of the MMPA. An example of the latter is a July 31, 2001, Marine Mammal Commission (Commission) letter stating that NMFS and the Commission have now determined that the MMPA prohibits NMFS from allowing foreign nationals to take marine mammals in U.S. waters and to export them to a foreign facility, although NMFS could permit U.S. nationals to do so. Since 1972, NMFS and the Commission have read the MMPA to allow for the issuance of such permits to foreign nationals and the letter admits that since the 1994 Amendments six such permits have been issued. Nevertheless, NMFS and the Commission have now decided that the legal authority they found in the MMPA somehow is no longer there. To reach that conclusion, they have discovered words and concepts nowhere found in the MMPA.

EII Response: This statement is largely rhetorical, and it is not backed by proof or example. The prohibition on takings for export to foreign facilities is clear on the face of the statute. In fact, it is the result of the 1994 amendments the industry helped craft. Significantly, the Zoo Alliance does not provide any legal authority or citation

for the proposition that such exports are authorized. The cited MMC letter explains why the Act, as amended in 1994, prohibits take permits for foreign facilities, and the Zoo Alliance should explain why that conclusion is incorrect. It is misleading to assert that the agencies have construed the law to allow such permits "since 1972." As noted, the amendment that resulted in this prohibition came about through the 1994 reauthorization. The fact that six such permits were improperly issued since then is no excuse for continued violation of the Act.

Zoo Alliance comment: We hope that we will be successful working with the agency through the normal administrative process to have this proposed rule drastically modified in a way that reflects Congressional intent. And we may need to look to Congress for support in that endeavor. Should our efforts be unsuccessful, we may have to request further legislative changes that will clearly and precisely limit NMFS' ability to continue to "interpret" the MMPA to insert provisions nowhere found in the law and to impose regulatory interpretations and reinterpretations that are duplicative, unnecessarily burdensome and contrary to Congressional intent.

EII Response: The industry has cited no reasonable basis for amendments to further reduce the control of this law over marine mammals in captivity. Any additional attempts by the Zoo Alliance to further weaken the MMPA will be vigorously opposed by EII. The MMPA should be amended to strengthen the

protections for marine mammals in captivity, and EII is considering possible proposals for that purpose.

CONCLUSION

EII generally supports the proposed NMFS regulations. In several respects, however, they need to be strengthened to ensure fulfillment of MMPA purposes, policies, and requirements. In addition, while EII supports the goal of efficient, non-duplicative interagency administration of the MMPA and the AWA, we believe NMFS has retreated too far from the role it must play to apply the MMPA to marine mammals in captivity. NMFS needs to reassert itself in this regard and, as a starting point for doing so, the agency should strengthen these regulations as requested in this comment letter.